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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,

Petitioners,

vs.

E. B. SPILLER et al.,

Respondents.

No. 577.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF AMICUS CURIAE, MISSOURI PACIFIC RAILROAD COMPANY.

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The facts in the Spillers reparation claim are not, in our opinion, to be distinguished from any ordinary reparation award. The excess charges under consideration were exacted after the passage of the Hepburn Act of June 29, 1906 (34 Stat. L. 584), to wit, from August 29, 1906, to November 17, 1908. During the time that these charges were collected, the Act provided that an opinion

of the Commission, to be effective, must be accompanied by an appropriate order, and a mere previous expression of the Commission's opinion that the rates in question were unreasonable, without an order entered thereon, was, after the passage of the Hepburn Act, a mere nullity (C. B. & Q. R. R. Co. v. Merriam & Millard, 297 Fed. 1, 3).

If the decision of the Circuit Court of Appeals in this case correctly announces the law, then hundreds of rates that are being collected by the carriers today in good faith and in reliance upon duly published tariffs may, by the retroactive effect of some future reparation award, be considered trust funds. The mere statement of such a situation seems so utterly repugnant to the underlying principles of the Interstate Commerce Act as to make argument unnecessary. The matter is one of great concern to every investor in railroad securities. The decision, both in its direct effect and its effect by analogy, is far reaching.

We are particularly concerned because of the fact that over a million dollars of overcharge claims, alleged to have been collected under the protection of an injunction decree during the Missouri rate litigation and predicated upon this so-called trust fund theory, are still pending before the Special Master in the Missouri Pacific-Iron Mountain Receivership cases, and the attorneys for these claimants are attempting to construe the decision of the Circuit Court of Appeals in this case as an authority to the effect that charges in excess of the statutory rate,

although collected under and pursuant to a decree of a court of competent jurisdiction, are trust funds, and that they need only be traced into the general "cash account," as distinguished from deposits or checking accounts in particular banks or depositories.

To Apply the Theory of a Constructive Trust to Reparation Awards Is to Invoke a Remedy Predicated on Principles Incompatible With Those Underlying the Act Itself.

Section 22 of the Interstate Commerce Act preserved all remedies then existing at common law. This language has been restricted to remedies consistent with the intent and purpose of the Act itself (T. & P. Ry. Co. v. Cotton Oil Co., 204 U. S. 426, 442; Penn. R. R. Co. v. Coal Co., 230 U. S. 184, 197). The so-called trust fund theory attempted to be invoked in this case is not consistent with the theory of the Act. It presupposes and is predicated upon the existence of a situation which the Act itself does not contemplate, and which is not in accord with its intent and purposes. This being true, the trust fund theory, admittedly cannot be resorted to as a remedy supplemental to the award of damages in the nature of reparation.

The inconsistency between the underlying facts on which the trust fund theory is predicated is best emphasized by first attempting to show the analogy between

reparation and restitution, and then, by recognized authorities, disclosing how utterly repugnant to the principles and facts underlying restitution are those underlying the theory of a constructive trust *ab initio.*

Restitution deals with funds or property acquired under a judgment or decree of a court of competent jurisdiction, which funds or property, by reason of the reversal of the judgment or decree, should not in equity be retained by the unsuccessful litigant. Reparation is an analogous statutory remedy invoked for the purpose of requiring a carrier to return to a shipper charges which, though legally collected under a valid tariff, are afterwards determined by the Commission to have been unreasonable. The subsequent determination of the unreasonableness of the charge collected does not make reparation mandatory. Because of the discrimination that might result as between localities, if such reparation were awarded, or for other similar good reason, the Commission may refuse to order unreasonable rates refunded.

Rates collected under a valid tariff are lawfully collected, just as that which is done under a valid decree is lawful, though afterwards, by the reversal of the decree, determined to have been wrongful. The reversal of the decree does not have the retroactive effect of making that which was done under its protection unlawful, nor should an award of reparation, by retroactive effect, make unlawful a tariff charge which has up to that time constituted the only lawful tariff charge that the carrier

could assess. Restitution and reparation both proceed upon the theory that what was done was, for the time being, lawfully done, and having been done under and pursuant to authority of the law no retroactive order can make the act unlawful, although it may determine that it was wrongful, and, therefore, justify reparation or restitution.

In Arkadelphia Milling Co. v. Ry. Co., 249 U. S. 134, 145-6, this Court had under consideration a situation where a carrier, under and pursuant to a decree of a court of competent jurisdiction, collected rates in excess of those which the state statute declared to be the only lawful intrastate rates. The decree of the lower court was reversed, and in applying the principles of restitution this Court said:

> "It is a typical case for an application of the principle of restitution, and the District Court properly held the Commission to be the representative of the shippers for this purpose."

A statutory action for overcharges is, of course, to be distinguished from the principles under consideration. We mean by this that if a statute provides for the recovery of all charges collected in excess of a specified amount, and enforcement of the statute is enjoined by a decree, which is later reversed, the erroneous decree may not nullify the statute, but merely suspend it. But such a statutory action is merely an action for money had

and received. No principles of equity are involved—there is no element of a trust fund—the statute merely provides for the recovery of a certain amount of money upon proof of certain existing facts. Where there is no such statutory remedy, or where for other reasons equity is invoked to either supply a complete remedy or a remedy supplementing the statutory remedy, then equity in such a case will apply the principles of restitution rather than the principles underlying constructive trusts.

We can see no material distinction between the lawfulness of the collection of a charge under a decree of a court of competent jurisdiction, as in the Arkadelphia case, and the lawfulness of the collection of charges under a subsisting tariff duly filed with the Commission, but later involved in a reparation award. The purpose of the act, and the underlying principles that lead to that purpose, must control, rather than the strained construction of some such word as "unlawful," as it appears in Section 1 of the Act, and which, we think, was intended under such facts as these to convey the idea of "wrongful," as that term is used in reparation decisions, as distinguished from "unlawful."

As said in the leading case of Penn. R. R. Co. v. Coal Mining Co., 230 U. S. 184, 197:

> "The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If,

as a fact, the rates were unreasonable, the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation."

Judge Sanborn, in his opinion in this case (North American Co. v. R. R. Co., 288 Fed. 612, 629-30), aptly says:

"The railroad company collected these legally established rates. It had the decision and direction of the highest judicial tribunal in the land for its justification, and this Court is of the opinion that its collection of these rates was not unlawful. The prohibition of section 1 and that of section 6 must be read and interpreted together, and the correct construction of them is that the specific prohibition of section 6 constitutes an exception from the general prohibition of section 1. A construction that each prohibition is of equal force and equally applicable in such case as that in hand would impose upon the carrier a penalty of a violation of section 1 if it complied with section 6, and the penalty of a violation of section 6, if it complied with section 1, and an interpretation which leads to such an absurdity ought to be rejected."

Having thus briefly shown the similarity in the underlying principles which, in the one instance, have prompted the remedy based on equitable principles termed restitution, and in the other instance, a statutory remedy known as reparation, it shall now be our purpose, by

citation of authorities defining restitution and distinguishing it from the principles applicable to constructive trusts, to thereby show that the same incompatibility must exist between the principles underlying reparation and those underlying the so-called trust-fund theory.

Restitution proceeds upon the theory that that which was done was lawfully done. There is no element of fraud, misrepresentation, deceit, illegality, wrong, or breach of moral or legal duty that taints the conscience of the party acting under the erroneous decree. The only duress is the duress of the decree, and the decree is, for the time being, the law of the land. A third party acquiring title for valuable consideration under such an erroneous decree, though acting with full knowledge of the pendency of the appeal, acquires title of which he is not divested by the reversal of the decree on which his title rests. The decree is, for the time being, presumed to be lawful and right, and there is no retroactive presumption that any party to the suit has proceeded upon a different theory. Just as the Commission may find that rates collected have been unreasonable, and yet decline to award reparation, so, likewise, may a court refuse to grant restitution. It is not founded upon any supposed wrong on the part of the unsuccessful litigant in enforcing the judgment, but upon the ground that in equity and in good conscience he ought, after reversal, to restore to the appellant everything of value which he received on account of the erroneous judgment, and, as a

consequence, it has been held that restitution is not a mere right, but is *ex gratia,* resting in the exercise of a sound discretion, and that a court will not order it when the justice of the case does not call for it.

The so-called trust-fund theory is predicated upon the contrary assumption that what was done was constructively unlawful *ab initio,* thereby constituting the wrongdoer a trustee *ex maleficio* or a trustee *de son tort.* Such a trust fund may be pursued into the possession of a purchaser for value unless he, moreover, be an innocent purchaser. There is no presumption that anyone has proceeded upon the theory that what was done was lawfully done. On the contrary, it is presumed that the wrongdoer has spent his own funds first, and that the trust money has remained at the bottom of the deposit. The privilege of recovering trust property is a matter of right, as distingushed from discretion. It discards the idea of a debt, a lien, or a claim for damages, and proceeds upon the theory that the party in possession was at no time entitled to treat the fund or property as his own, and presumes that all parties with knowledge of the facts so understood the situation and conducted themselves.

Disposing of certain overcharge claims collected under facts similar to those in the Arkadelphia case, supra, and in all respects similar to those pending against *amicus curiae,* Missouri Pacific Railroad Company, to which reference has heretofore been made, Judge Seddon, Special

Master in the M. K. & T. receivership proceedings, in an unreported opinion, has so ably distinguished the principles underlying the two theories that we adopt his language as our own, to wit:

> "The claim of a right to sue as and for an unlawful act committed at the time the alleged illegal exaction of the charges was made, and the right to have restitution of the amount of such charges, are in their natures so essentially antagonistic that they cannot exist together. The former right arises, if at all, at the time the charges were collected, and is predicated on the assumption that the exaction and collection of the charges was entirely unlawful, that the remedy was merely suspended by the injunction, and that it was revived by the reversal of the judgment and the consequent dissolution of the injunction. The latter cause of action (restitution) does not arise until the dissolution of the injunction, when it comes into existence from an entirely different consideration. It is predicated upon the assumption that the act of exacting and collecting the charge was not unlawful. It is not, as is supposed by the learned counsel for the intervener, a case of the choice between two remedies for the same cause of action. The causes of action are distinctly antagonistic."

The relevant portion of Judge Sanborn's unreported opinion, affirming Judge Seddon's report, from which we have just quoted, will be found in the appendix of "Petition of Missouri Pacific Railroad Company for Leave to File Amicus Curiae Brief," heretofore filed in this cause.

We briefly quote from Judge Sanborn's opinion:

> "From the time the District Court first held the statutory rates of 1905 and 1907 confiscatory and issued its first restraining order or injunction until the Supreme Court reversed its final decree, that holding was the law of the land on the subject of these rates so far as the parties to the suit before that court were concerned, because that court was the judicial tribunal in which the power was then vested and on which the duty was then imposed to adjudge what rates were confiscatory and what were not. * * * Its reversal of that holding adjudged that that holding was mistaken and erroneous, and vested in the interveners a right to a reparation of the losses they had sustained by the collection of the excessive rates, of the amount of which those excessive rates and interest on them were competent evidence. But that reversal did not so relate back as to render the mortgagor company's collection of the excessive charges, which was rightful and lawful when it was made, wrongful and unlawful when it was made, nor did it have the effect to charge the mortgagor company which lawfully and rightfully made the collection and applied the moneys collected to the payment of its current expenses and obligations while the District Court's holding and injunctions were in force, as a trustee *ex maleficio* of those moneys as fast as it collected them."

The right of restitution, as distinguished from any trust-fund theory, will never be more clearly defined than in the leading case of Bank of United States v. Bank of

Washington, 6 Pet. 8, 19, wherein the Supreme Court of the United States, emphasizing the fact that the reversal of the judgment does not make void that which was done under it, but simply gives a new right or cause of action termed restitution, said:

> "The reversal of the judgment cannot have a retrospective operation, and make void that which was lawful when done. The reversal of the judgment gives a new right or cause of action against the parties to the judgment and creates a legal obligation on their part to restore what the other party has lost by reason of the erroneous judgment; and, as between the parties to the judgment, there is all the privity necessary to sustain and enforce such right; but, as to strangers, there is no such privity; and if no legal right existed when the money was paid to recover it back, no such right could be created by notice of an intention so to do."

The Court then proceeds to point out the distinction that:

> "Where money is wrongfully and illegally exacted, it is received without any legal right or authority to receive it, and the law, at the very time of payment, creates the obligation to refund it."

For additional authorities to the same effect see 2 Ruling Case Law, pp. 291-293; Gay v. Smith, 38 N. H. 171, 176; Field v. Anderson, 103 Ill. 403, 406; Macklin v. Allenberg, 100 Mo. 337, 345; City v. Gas Light Co., 82 Mo.

349, 355; Dodson v. Butler, 101 Ark. 416, 420; McAusland v. Pundt, 1 Neb. 211, 244; R. R. Co. v. Bisbee, 18 Fla. 60, 65; Fidelity Trust Co. v. Banking Co., 119 Ky. 675, 682; Bridges v. McAllister, 106 Ky. 791, 797; Harrigan v. Gilchrist, 99 N. W. 909, 1009 (Wis.); Dunfee v. Childs, 53 S. E. 209, 216 (W. Va.).

"The claim of the right to sue as and for an unlawful act committed at the time the alleged illegal exaction of the charges was made, and the right to have restitution of the amount of such charges, are, in their natures so essentially antagonistic that they cannot exist together." This apt comparison between the trust-fund theory and restitution, applies with equal force to a comparison betwen reparation and constructive trusts. They are not only inconsistent, but predicated upon diametrically opposing principles. One proceeds upon the theory that what was done was, for the time being, lawfully done; the other presupposes that the acquisition of the funds has been without legal or equitable justification.

To use the language of Judge Sanborn (288 Fed. 631):

> "The theory and indispensable basis of the alleged trust is that the ownership of the moneys collected by the company from the excessive charges never passed from the interveners to the collector, but that the latter took and its successors in interest still hold those moneys in trust for the owners, the interveners. The theory and the indispensable basis for the remedy by reparation provided by the Act to

> Regulate Commerce is that the interveners lost the title and onership of the moneys collected by the company, were damaged by that loss, and that those damages are to be paid by the reparation provided by Act to Regulate Commerce."

We, therefore, respectfully submit that to apply to reparation claims the equitable principles, remedies and presumptions that may be invoked with respect to constructive trusts, is to add a supplemental remedy which is, of necessity, predicated upon principles inconsistent with those underlying the Interstate Commerce Act itself, and the two remedies, being thus inconsistent, cannot exist together.

Concerning the Tracing of the Alleged Trust Funds.

The facts respecting the tracing of the alleged trust funds are stipulated (Tr., p. 331). They are attempted to be traced into the total cash account, as disclosed by the books of the prior company, and it is shown that at no time did the combined cash in the various depositories and in the possession of the various departments of the railroad fall below the amount of these claims. They are not traced into any particular bank account or deposit. Judge Kenyon, disposing of this issue, speaking for the Circuit Court of Appeals in this case, says: "It is not necessary to show that the identical money received has been placed in a separate account, or to trace the identical funds" (Tr., p. 764). That they were

wrong in this opinion has since been tacitly conceded by two of the Judges who participated in the opinion, for both Judges Kenyon and Stone concur in a more recent decision of the same Circuit Court of Appeals to the contrary, to wit, Farmers National Bank of Burlington v. Pribble, 15 Fed. (2nd) 175, 176, 179. It is quite evident that Judge Sanborn, who wrote the opinion in the case last cited, has convinced the judges who are responsible for the opinion under review, of their error. We pass this feature of the case without further comment, as it will doubtless be fully briefed by counsel for petitioners.

We do desire to emphasize, however, that the tracing of these funds into a particular bank deposit, instead of into the mere bookkeeping account of cash on hand, would not in this case have sufficed if the views expressed in the preceding paragraphs of this brief are well taken. Such tracing of the funds by showing that there was at all times a sufficient amount in the deposit to take care of the claim is predicated upon the presumption that the alleged wrongdoer has dealt with the money as a trust fund, and that he has withdrawn his own funds first. But such a presumption is no more warranted in a reparation suit than it is in a claim for restitution. As we have heretofore stated, both reparation and restitution are predicated upon the theory that what was done was lawfully done. Title to the funds passing by the decree or collected under a valid tariff vests in the party so collecting them, and there can be no presumption that he

has at any time prior to the reversal of the decree or the award of reparation dealt with the funds other than as his own property.

The legal presumption is in favor of the correctness of a judgment (Burr v. Des Moines Co., 1 Wall. 99, 103; Macklin v. Allenberg, 100 Mo. 337, 345). If an appeal has been taken, the party acquiring title under the decree of the lower court is not to suppose that the judgment will be reversed, but the contrary (McAusland v. Pundt, 1 Neb. 211, 244).

As stated in Langley v. Warner, 3 N. Y. 327, 330:

> "No one was bound to presume that the judgment of a court of competent jurisdiction was erroneous, and would be reversed. The legal presumption was the other way—that the judgment was right and would be affirmed."

In a restitution suit, therefore, the presumption that the decree of the lower court is correct rebuts any presumption that a litigant acquiring property under such decree has dealt with the property as a trust fund, or, in other words, has proceeded upon the theory that the decree would be reversed

The reasoning seems equally applicable to reparation. Surely, the carrier is not presumed to have proceeded upon the theory that charges collected under a valid tariff were not being lawfully collected and must be preserved at the bottom of the deposit for the account of the rightful owner.

When the charges are collected, the carrier may believe in good faith that they are reasonable. If the tariff is duly filed and is not suspended by the Commission, all concerned are not only permitted, but obliged, to proceed upon the theory that the rates in such tariff have the binding effect of statutory enactments. To charge a carrier with the presumption that it has conducted its business on the theory that the charges collected under a valid tariff were unlawful charges is equivalent to indulging the same presumption with respect to acts performed under statutory authority. The statute may be declared unconstitutional and the tariff rate may be declared unreasonable and reparation awarded, but pending this action no one is presumed to have conducted his business upon the theory that what the law declared lawful was actually unlawful.

Discussing the presumption under consideration, it has been uniformly conceded that "this is a mere presumption, which will not stand against evidence to the contrary" (Brennan v. Tillenghast, 201 Fed. 609, 614; Board of Com'rs v. Strawn, 157 Fed. 49, 51). Nor will it stand in the face of a contrary presumption (Yarnell v. Ry. Co., 113 Mo. 570, 579).

We, therefore, respectfully insist that the presumption often invoked in the tracing of trust funds, to the effect that the wrongdoer has withdrawn his own funds from the deposit and permitted the trust fund to remain at the bottom of the checking account, will not prevail in a

case of this kind where the presumption, at the time, is that the funds have been lawfully collected and are, therefore, the absolute property of the party receiving them.

Concerning the Other Issues in This Case.

We are primarily interested in the fundamental principles which distinguish the trust-fund theory from restitution and reparation. It is not our desire to meddle with issues which alone affect the principal parties to this litigation, and yet upon reading and rereading the opinion of the Circuit Court of Appeals in this case, we are convinced that in its discussion of every issue involved, such radical views have been taken that the opinion, if permitted to stand in any respect, establishes a dangerous precedent, and tends to befog rather than to clearify the issues discussed. A few illustrations will suffice:

Interest on trust funds can only be allowed as damages, and the principles of a constructive trust could not possibly be applied to damages, and yet the Court, in failing to distinguish between the alleged trust fund proper and the interest allowed as damages for its retention, has treated the entire judgment as a trust fund (Tr., p. 768).

Of course, since the interest itself does not constitute a trust fund, the Court has erred in allowing interest subsequent to the date of the receivership proceedings (Thomas v. Car Co., 149 U. S. 95, 116).

The opinion imposes liability upon the purchaser by reason of that part of the final decree which requires such

purchaser to assume those claims which are adjudicated prior in lien or superior in equity to the mortgage (Tr., p. 760). But the Court overlooks the fact that if these funds passed into the mortgaged property, as it so assumes, then the bondholders have a prior right by reason of their being innocent purchasers for value. They occupy the position of such innocent purchasers for value, not only under well-established principles of law, but by the specific finding of the final decree itself (Tr., pp. 595 and 598).

If it were necessary for Spillers to have reduced his claim to final judgment before filing it with the Special Master, then what the Court has to say respecting laches and estoppel might be well taken. Those who deal with a receivership proceeding should do so with knowledge that orders are usually made prescribing shorter periods of limitation than are allowed in other cases. They are charged with the knowledge that general creditors' bills contemplate the filing of all claims, both liquidated and unliquidated, with the Special Master on or before a time to be fixed by the Court. If we are correct in understanding that these claimants refused to anticipate or heed such an order, and after the purchaser had acquired the property in reliance upon the limitations and orders which barred claims that had not been timely and properly asserted, then for the first time attempted to come in under the final decree and assert claims superior in equity to the mortgage that was foreclosed, surely they are barred

by estoppel and laches, the opinion of the Circuit Court of Appeals to the contrary notwithstanding.

The Court's strained construction of the term "arise," as used in the Final Decree (Tr., pp. 756-9), does not seem at all in keeping with the apparent intention of the decree, and is apparently resorted to, as admitted in next to the last paragraph of the opinion, for the avowed purpose of attempting to find a means of disposing of the case on what the Court considered broad principles of justice.

The Love case, on which the opinion leans so strongly (Tr., pp. 762 and 764), has no application to such a situation as is here presented. In the Love case, title to the excess charges was not vested in the carriers, but the carriers, by virtue of a supersedeas bond, were permitted, for the time being, to collect the overcharges. Before the charges were collected, it had been adjudicated that the money belonged to the shippers, and the carrier merely collected it under the protection of a supersedeas bond, and not with any lawful claim to title. Furthermore, as respects the tracing of the funds, the claims in the Love case accrued within six months of the date of the receivership, and hence, specific tracing of the funds was unnecessary.

Nearly every principle of law announced in the opinion under review is questionable, loosely stated, and tends to disturb principles of equity that have heretofore been fairly well established. As opposed to this, the opinion

of Judge Sanborn in this case is exhaustive, well considered and logical.

We respectfully urge that Judge Sanborn's views in toto be sustained, and that the opinion of the Circuit Court of Appeals be overruled.

Respectfully submitted,

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